Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

alone." It does not seem to be questioned that the flaring front design has, in an automobile lamp, decided utility and this is the feature of the "Phoebus" to which censure is primarily attached. Thus the cases cited apparently are not authority for the present ruling.

Independent of these two cases from which an argument in favor of an injunction can be drawn only with difficulty others may be cited which hold positively against the ruling; as for example in the case of *Brown v. Seidel,* 153 Pa. St. 60, the court said: "It is only where there is a manifest intent on the part of one manufacturer to sell his goods as and for the goods of another manufacturer that the aid of equity has been successfully invoked." No such intention was proven on the part of the Manhattan Screw and Stamping Works. While in order to prove fradulent intent it is not necessary to show that any purchaser was in fact misled, *Von Mumm v. Frash,* 56 Fed. 830, still the absence of evidence to show that any one has been deceived is a circumstance tending to show that no one is likely to be deceived, *Heinz v. Lutz,* 146 Pa. St. 592. This is especially true where the article is expensive.

Automobile lamps are as a rule sold among persons of more than ordinary intelligence and being an expensive article we might naturally expect that care would be used in their selection. The fact that these circumstances must be considered, is clearly demonstrated by the case of *Fischer v. Blank,* 138 N. Y. 244, in which the court said: "The true test, we think, is whether the resemblance is such that it is calculated to deceive, and does in fact, deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates."

THE EFFECT OF NONUSE ON A PATENTEE'S REMEDY AGAINST INFRINGEMENT.

Our liberal theory as to patent right is in harmonious accord with the broad spirit of our constitutions and our courts encouraging private enterprise in general. Commerce, manufacture and production have been left as free as possible from governmental surveillance. For in a new country, the chief ambition is growth and the strongest incentive to advance is private property. Not only should the volume of business be improved, but also the methods of operation should constantly be changed for the

better by the adoption of new ingenious devices. To foster invention and discovery to the very limit of the law was the far-sighted aim of the framers of the Constitution, Article I, Sec. 8, which reads: "The Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." So explicit a grant to patentees could not well be construed, observing the recognized rule that constitutional provisions are to be read according to their obvious intendment, as giving, during the time prescribed, a narrower right than that which inheres in the absolute owners of property in general. That this right is not lost by a failure to use a patent is affirmed in the recent case of *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 28 Sup. Ct., Rep. 748.

Upon this idea of property right, the early decisions and the best modern opinions stand strong. The Supreme Court declared in 1846: "The law has enabled the patentee to hold and deal with his patent the same as in the case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate to his legal representatives and becomes part of the assets." *Wilson v. Rousseau,* 4 How. 646. See also *Jordan v. Overseers,* 4 O. 295. Since he is in no sense indebted for this right to the law; *Jordan v. Overseers, supra;* he consequently may deal with it as he sees fit during his period of monopoly and also afterwards, the sole difference being that in the one case he is protected by the law. In return for this he incurs one single contractual obligation, which is to describe and deliver his secret to the public at the expiration of his period of monopoly. Showing that the public has no right to the benefit of any patent right until then, the United States Supreme Court said in 1896: "That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others to avail themselves of it upon reasonable terms is doubtless true. This expectation is based alone on the supposition that the patentee's interest will induce him to use, or let others use his invention. The public has received no other security to enforce such expectation. A suppression can endure but for the life of the patent and the disclosure he has made will enable all to enjoy the fruits of his genius." *Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co.,* 47 U. S. App. 146.

However clear it may be that this interest of the public is

utterly abstract and without legal significance, considerable error has arisen by imposing on the patentee a legal duty to use his patent, thus making him a quasi-trustee for the public. The influence of this view has been subtle. Peculiar cases have been presented, where the patentee has closeted his patented device, another person of enterprise has applied it to vastly cheapening and improving a certain production with great service to the public so that the contrast has elicited favorable consideration for one who is actually an unmistakable infringer. So strong is public opinion in demanding, above all, public service that the courts frown upon a non-user and uphold one apparently more enterprising who has violated an express law. Thus the court in *Sullivan v. Redfield,* Fed. Cas., No. 13,597, intimated that a certain rule "applies with peculiar force to a case where a patentee has slept upon a naked patent right for a great length of time without carrying it into effect." The same reasoning was used in the decision of a case where a prior patented, but unused invention had been interfered with by a subsequent patent on an exactly similar machine: "The Stonemetz press, though covered by a patent, seems to me a mere disembodied idea, which, whatever its merit, is not here entitled to equitable aid, nor within the spirit of the patent system, which requires diligence in giving to the public the benefit of his invention." *Campbell Printing Press & Mfg. Co. v. Duplex Printing Press Co.,* 86 Fed. 331. The most conspicuous case and one in which the fact of non-use constituted the main ground for denying remedy against infringement is *Hoe v. Knap,* 27 Fed. 204: "The question therefore arises whether a court will grant an injunction in favor of an owner of a patent who has not after a reasonable time put it into use, against another who is using it. I think, under a patent which gives a patentee a monopoly, he is bound either to use the patent himself or allow another to use it on reasonable or equitable terms."

None higher than a Circuit Court has ever taken this view. The best jurisdictions have insisted on clinging to the elementary, constitutional idea of absolute right in a patentee. For example: "A man may obtain a patent for an invention and let it lie in the Patent Office without use, and no one else would have the right to use such invention: because it is his property." *Pitts v. Wemple,* 2 Fischer, 10. The reasoning in *Hoe v. Knap, supra,* was directly attacked in *Button Fastener Co. v. Specialty Co., supra.* See also: *Mount Morris Electric Light Co. v. Edison Electric Light Co.,* 20 U. S. App. 111.

The patentee should merit the benefit of the doubt in case of failure to use his invention, for there are many conceivable ways of explaining such conduct. Possibly he is waiting to perfect an improvement; may be occupied with another patent of more importance; or he may be without funds.

Whatever the particular circumstances may be, it is the duty of a court to apply clearly expressed rules. The unusual right of the patentee to protection is emphasized by his exceptional position under various acts. In selling his patent he is free from the restrictions of the Sherman Anti-Trust law and therefore may annex the most monopolistic conditions to his sale. *Victor Talking Machine Co. v. The Fair,* 123 Fed. 424. Not even misuse of his patent in some way negatives the presumption that he will serve the public, for he is allowed wide freedom. *Fuller v. Berger,* 120 Fed. 274. Certainly nonuse ought not ever to induce a court to act in contravention of so marked a policy.

THE PRESUMPTION OF UNDUE INFLUENCE IN WILL CASES.

The case of *Lockwood v. Lockwood,* decided by the Supreme Court of Errors of Connecticut, in March, 1908 (80 Conn. 513, 69 Atlantic 8), contains an unusually lucid exposition of the law as to the burden of proof in will cases and the nature of the presumption of undue influence, and a sound and convincing limitation of that presumption.

The rule of the burden of proof in contests as to the probate of a will is complicated, first, by the especial importance given to the subscribing witnesses by the law of wills, secondly, by the normal presumption of sanity, and thirdly, by exceptional presumption of undue influence.

The issues in the ordinary will contest are three: did the testator execute the will in the manner required by law, was he of sound and disposing mind and memory, was he induced to make the will by any fraud, duress or undue influence?

It is evident that, as to the first two of these issues, the burden of proof is upon the proponent of the will; the will cannot be probated until it has been shown to the court that the testator was competent to make a will, and that he did make it in the legal manner. But, the presumption that every man is sane until proof is given to the contrary would relieve the proponent of the necessity of opening the question of mental competency (as the State is relieved of proving the prisoner's sanity in a criminal prosecu-